Supreme Court, U.S.
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No. 02-1478

In The
Supreme Court of the United States

MARTIN P. SHEEHAN, Trustee for the Bankruptcy Estate of T & T Fuels, Inc. and Sheehan & Nugent, P.L.L.C. and Phillips, Gardill, Kaiser & Altmeyer, PLLC,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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52 pp

QUESTIONS PRESENTED

1. Whether the strict requirements for compensation of Trustees and their professionals in the bankruptcy code and rules obviate the need to decide the Constitutional question(s) of whether the "uniform law" provisions provide Congress with the authority to abrogate the State's 11th Amendment Immunity?

2. Does the "uniform law" provision of the Constitution provide Congress with the authority to abrogate the State's 11th Amendment Immunity?

3. Does the filing of a proof of claim waive a State's 11th Amendment Immunity for any and all claims against it, or, just for compulsory counterclaims?

4. Does the limits of bankruptcy court jurisdiction prohibit Trustees and their professionals from filing state law claims based on constructive trust/quantum meruit attorney fees after there has already been a final distribution in the underlying bankruptcy case against a state's restitution proceeds garnered in a separate criminal matter that have already been spent on environmental remediation?

5. Is it fundamentally unfair to require a state to file a proof of claim in order to participate in a bankrupt estate and thereby mandate a waiver of the state's 11th Amendment Immunity?

6. Is the State of West Virginia Court of Claims the proper forum for the Trustee and his counsel to file claims?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

In addition to those Constitutional and statutory provisions set forth in Petitioners' brief, Respondent-WVDEP lists the following:

1. W. Va. CONST. Art. VI, § 35 provides that: "[t]he State of West Virginia shall never be made defendant in any court of law or equity."

2. The following statutes and rules regarding compensation for Bankruptcy Trustees and their professionals:

> 11 U.S.C. §§ 326-331 and FRB §§ 2014, 2016, 2017 and 7054; *see also,* 28 U.S.C. § 586(e).

STATEMENT OF THE CASE

A. Facts

From 1971 to 1993, the debtor, T & T Fuels, Inc. (T & T) mined coal owned by the Kingwood Coal Company (now ANR). In 1994, a huge breakout of acid mine drainage (AMD) occurred which overwhelmed T & T's treatment facility resulting in millions of gallons of AMD to flow into waters of the state.

On October 27, 1995, the debtor (T & T) filed for Chapter 7 Bankruptcy protection. Petitioner, Martin Sheehan was appointed Trustee. On November 2, 1995, pursuant to a Bankruptcy Court Order, the Respondent, the West Virginia Department of Environmental Protection (WVDEP or Respondent) began treatment of the AMD at the site. Treatment to control the AMD remains

constant today and costs approximately $30,000.00 per month.

The Trustee proceeded to garner the assets of the bankrupt estate, including the filing of an adversarial proceeding against Paul Thomas, President and 50% owner of T & T. The Trustee hired legal counsel to help and the Petitioners filed a Motion For Summary Judgment against Paul Thomas in the adversarial proceeding. However, the Bankruptcy Court denied summary judgment and the case was set for trial.

On February 23, 1996, WVDEP filed its initial two-part proof of claim for (1) an administrative expense priority claim (injunctive relief) for $18,000,000 for costs associated with present and future treatment of AMD and (2) an unsecured non-priority claim for $273,639 resulting from nonpayment of civil penalties assessed against the debtor. WVDEP later amended its claim citing the increasing costs it expected to incur in the treatment of the AMD. Additionally, ANR filed a "contingent" Proof of Claim requesting payment from the debtor if a person successfully filed a claim against ANR for acts and omissions of T & T at its mine sites. Many other creditors, including the United States on behalf of the Environmental Protection Agency (EPA), also filed claims.

On April 22, 1996, the Trustee filed an objection to WVDEP's claim. On September 16 and 17, 1996, trial was held on WVDEP's claim. On February 20, 1997, the Court issued its Memorandum Opinion and Order setting the WVDEP's claim at $6.7 million and changing the status from administrative priority to general unsecured. The WVDEP appealed the Bankruptcy Court's Order to District Court.

Thereafter, the parties informed the Court of a possible settlement of WVDEP's claims due to its status as a victim of criminal activities perpetrated by Paul Thomas. The proposed settlement hinged on proceedings occurring in the federal criminal arena where Thomas was being pursued for violations of the federal Clean Water Act. On December 9, 1997, Thomas pled guilty to one count of violating the Clean Water Act. He received five years probation and agreed to pay restitution to the victims of his crimes, the citizens of West Virginia. The Order of Restitution directed Thomas to pay $443,400 to WVDEP to cover $273,000 in delinquent civil penalties owed by T & T and for $170,400 in land reclamation costs for its Preston County mine sites. Moreover, the Court ordered Thomas to pay $36,000 per month to treat water from T & T mines until the time "non-compliant water is no longer produced at the sites known as T & T Fuels, Inc.'s No. 2 and No. 3 mines." The WVDEP placed the initial contributions and the subsequent payments which totaled approximately $1.4 million dollars into the State of West Virginia Special Reclamation Fund which is part of the State Treasury. W. Va. Code § 22-3-11(g). On December 11, 2001 the U.S. District Court ordered Paul Thomas' restitution obligations terminated.

In addition, EPA and WVDEP settled ANR's liability. WVDEP's share of that settlement was $1.7 million dollars.

To date, the WVDEP has received a total of approximately $3.1 million dollars for AMD treatment and has expended approximately $5.1 million dollars in treatment costs.

As part of the Paul Thomas federal Clean Water Act plea agreement, the United States District Court ordered that the WVDEP withdraw its Proof of Claim. Since WVDEP withdrew its claim, ANR also withdrew its contingent Proof of Claim. It should be noted that the United States on behalf of the EPA previously withdrew its claim in April, 1997.

WVDEP moved the Bankruptcy Court for approval to withdraw its claim and on May 7, 1998, the Court signed the Order approving WVDEP's withdrawal of its claims. **The Trustee did not object to or appeal WVDEP's withdrawal.**

Subsequently, the Trustee held a final hearing distributing the remaining assets to the remaining creditors. Since the largest creditor (WVDEP) had withdrawn and because ANR and EPA withdrew their claims, the Trustee settled his adversary proceeding against Paul Thomas and was able to pay secured creditors in full and unsecured creditors received approximately 70% of their claims.

Finally, the Petitioners filed a Motion By Counsel For the Trustee for Imposition of a Constructive Trust and For Direct Payment of a Quantum Meruit Fee by the West Virginia Department of Environmental Protection in the Bankruptcy Court for the Northern District of West Virginia (Motion). This Motion forms the basis of this appeal. The Motion was filed **18 months** after the Respondent-WVDEP had an Order Withdrawing Claim entered by the Bankruptcy Court without objection or appeal by the Petitioners. This Motion was not filed on behalf of the Estate of T & T. It was filed on behalf of the Trustee's counsel, namely, Trustee's own lawfirm and the lawfirm of Phillips, Gardill, Kaiser & Altmeyer, PLLC.

After briefing and a hearing, the Bankruptcy Court in an Order dated August 21, 2000, determined that the 11th Amendment to the Constitution barred any of the claims made by counsel to the Trustee. The Petitioner appealed to the U.S. District Court and the Bankruptcy Court's decision was affirmed in a Memorandum Opinion and Order on December 12, 2001. Petitioners appealed to the 4th Circuit Court of Appeals. The 4th Circuit Court affirmed the decision of the U.S. District Court in an opinion dated January 9, 2003.

B. Petitioners' Claims

The Petitioners filed the instant Petition For Writ of Certiorari based upon the issue of whether the "uniform laws" provisions of the Constitution provide a basis for Congress to abrogate State 11th Amendment Immunity, specifically, whether 11 U.S.C. § 106 is constitutional.

Petitioners also have filed based upon alleged litigation conduct of the Respondent-WVDEP and, in a newly asserted issue, on whether Respondent-WVDEP's conduct constituted a waiver under the "common benefit" doctrine of the 11th Amendment.

C. Respondent's Objections to the Petition

WVDEP objects to two different items, one, the assertion of a new theory of recovery, and two, an unsupported statement of fact. Specifically, WVDEP objects to the assertion of the "common benefit" doctrine at this late stage in the proceedings. In addition, WVDEP objects to the Petitioners' claim that representations were made by Respondent's counsel to the Petitioners that there would

be no separate agreement with Paul Thomas during the pendency of the Bankruptcy proceeding. Petitioners' Brief, p. 7. As for the new assertion of the Petitioners that Respondent's former counsel "agreed to not enter into any separate agreement," current counsel was not representing the Respondent at the time these alleged statements were made. Accordingly, counsel is without information to prove or disprove the truth of the matter asserted. There appears to be nothing written in the Respondent's files about any "deal" not to enter into any "separate agreement." A review of the record indicates that assertion of the "common benefit" doctrine is a new issue raised for the first time in the instant Petition For Writ of Certiorari.

The "common benefit" doctrine issue and the issue regarding the alleged agreement between the Petitioner and Respondent's former counsel are issues that should not be considered. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258-259, 107 S.Ct. 1114, 1115, 94 L.Ed.2d 293 (1987), *reh'g denied*, 481 U.S. 1033, 107 S.Ct. 1966 (1987); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *U.S. v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975).

D. Respondent-WVDEP's Assertions

WVDEP asserts that the Petitioners have failed to follow the strict requirements of the Bankruptcy code and rules for compensation. Filing a state law claim for Imposition of a Constructive Trust and For Direct Payment of a Quantum Meruit Fee on their own behalf after the Bankruptcy case has distributed estate funds is well outside the scope of the law with respect to compensation of a Bankruptcy Trustee and his professionals. WVDEP asserts that

the Petitioners could have objected to the Order Withdrawing Claim and/or appealed the same. Petitioners could have requested fees be paid for the work done on the Trustee's objections to WVDEP's Proof of Claim, and possibly, the work performed on the adversary proceeding against Paul Thomas. The instant appeal is clearly an attempt to resurrect objections and/or appeals that have long since passed. Therefore, this Honorable Court should deny Petitioners' Constitutional "uniformity of law" and "waiver" claims based upon the fact that it falls outside tne scope of traditional Trustee compensation allowed under the Bankruptcy code and rules and otherwise, Petitioners are simply attempting to circumvent their failure to object to the Order Withdrawing Proof of Claim. There is no need to rule on these Constitutional issues when Petitioners' claims fall well outside the traditional scope of the law regarding compensation for the Trustee and his professionals.

WVDEP asserts that 11 U.S.C. § 106 is unconstitutional. Well established precedent of this Court and the majority of Circuit Courts and District Courts establishes the fact that Congress may only abrogate 11th Amendment Immunity pursuant to Section 5 of the 14th Amendment, and since 11 U.S.C. § 106 was enacted pursuant to Article I of the Constitution, it cannot serve as a valid basis for abrogation.

WVDEP asserts that it did not waive its 11th Amendment Immunity, especially for these claims unrelated to the adjudication of the Debtor (T & T) and its estate. WVDEP states that it did not by any express, or clear and unequivocal, statement or action waive its 11th Amendment Immunity. Even if it did, it did so only for those compulsory counterclaims related to WVDEP's Proof

of Claim. Since, Petitioners state law constructive trust/quantum meruit claims are unrelated to WVDEP's claims for fines and reclamation associated with the on-going AMD, they are not compulsory counterclaims.

Petitioners' Motion falls outside the traditional limits of Bankruptcy court jurisdiction. Further, a "forced" participation in Bankruptcy court cannot be a basis for waiver of 11th Amendment Immunity.

SUMMARY OF THE ARGUMENT

Petitioners should be required to comply with the strict fee requirements for Trustees to be paid as enunciated in the applicable Bankruptcy statutes and rules. Petitioners' underlying Motion by Counsel for the Trustee for Imposition of a Constructive Trust and for Direct Payment of a Quantum Meruit Fee by the West Virginia Department of Environmental Protection (Motion) was not a claim based upon the jurisdiction of the Bankruptcy court over the debtor or the debtor's estate, rather it is an unrelated state law claim for retroactive money damages. Congress may not rely on Article I powers in abrogating 11th Amendment Immunity, that only pursuant to Section 5 of the 14th Amendment may such abrogation be legally effectuated. WVDEP asserts that it did not waive its immunities. The WVDEP did not by any express or clear, unequivocal statement, nor by its actions, waive its 11th Amendment Immunity. WVDEP did not waive its 11th Amendment Immunity by filing a Proof of Claim (for treatment of AMD) because the underlying Motion was unrelated to WVDEP's Proof of Claim, and otherwise, could not be considered a compulsory counterclaim.

This Honorable Court should not overrule *Schlossburg v. Maryland*, 119 F.3d 1140 (4th Cir. 1997). Petitioners' claims contained in the underlying Motion (if allowed to proceed) violate the Respondent's rights under the 11th Amendment to be free from suit and state Sovereign Immunity as enunciated in the W. Va. CONST. Art. VI, § 35. Petitioners' claims fall outside of the limits of Bankruptcy court jurisdiction and fundamental fairness mandates against a "forced" waiver.

ARGUMENT

TRUSTEES AND THEIR PROFESSIONALS ARE BOUND BY THE STRICT REQUIREMENTS OF THE BANKRUPTCY CODE AND RULES

In seeking this Petition, the Petitioners are attempting to expand the scope of the law with respect to the awarding of fees in the Bankruptcy context. The general rule is, of course, that **absent statute** (or rule) or **enforceable contract**, litigants must pay their own attorneys fees. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-723, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967); *F.D. Rich, Inc. v. United States Ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 126-131, 94 S.Ct. 2157, 2163-2166 (1974) and *Hall v. Cole*, 412 U.S. 1, 4, 94 S.Ct. 1943, 1945, 36 L.Ed.2d 702 (1973).

Trustees and their "professionals" are awarded compensation pursuant to the strict requirements of the United States Bankruptcy Code and the rules promulgated thereunder, specifically, 11 U.S.C. §§ 326-331 and FRB §§ 2014, 2016, 2017 and 7054; *see also*, 28 U.S.C. § 586(e). None of these statutes or rules allow for the

Trustee and/or his attorneys to recover their fees incurred in the administration of a Bankruptcy estate against the victims in a criminal restitution matter. But here, this is exactly what the Petitioners are attempting to accomplish. The Petitioners are attempting to usurp the criminal restitution monies that accrued to the citizens of the State of West Virginia because of the devastating environmental harm that occurred and continues to occur to this day. The Trustee and his counsel filed the underlying Motion on their own behalf, not on behalf of the Debtor or the Debtor's estate, this is clearly outside the scope of Bankruptcy law with respect to compensation for the Trustee and his "professionals."

The facts of this case indicate that, after the criminal restitution matter against the individual Paul Thomas, the State of West Virginia withdrew its claim. This withdrawal was made upon Order of the Court and the Trustee and his Counsel were, of course, given notice and had knowledge and consent of this fact. The withdrawal Order contained no provisions regarding payment of fees or costs for the previous work done by the Petitioners in regard to either the hearing on the objections to the Respondent's claim or the work done in the adversarial proceeding against Paul Thomas.

FRB § 3006 regarding the "Withdrawal of Claim(s)", states, in pertinent part, that "[t]he order of the court shall contain such terms and conditions as the court deems proper." Pursuant to FRB § 3006, the Petitioners could have filed objections to the withdrawal Order. Petitioners could have requested fees and costs be paid for all the work done by the Trustee and his professionals on the objections to the Respondent's Proof of Claim and, possibly, the work done pursuant to the adversary proceeding

against Paul Thomas. Also, the Petitioners could have filed an appeal of the withdrawal Order. Instead, the Petitioners did nothing until 18 months later when they filed the underlying Motion.

The Supreme Court should finalize this matter and deny the Petition based upon the failure to abide by Bankruptcy laws regarding compensation of Trustees and his professionals without adjudicating the Constitutional issues raised. *See U.S. v. Locke*, 471 U.S. 84, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985).

Accordingly, the Respondent-WVDEP asserts that the Bankruptcy Court, the District Court, and the 4th Circuit Court of Appeals were correct in denying the Motion (and/or affirming the lower court decisions) because Petitioners' original Motion was clearly an attempt to resurrect objections and/or appeals of the May 7, 1998 Order of Withdrawal that have long since passed. (*See*, FRB 8002, which requires filing Notice of Appeal within ten (10) days after entry of "order").

11TH AMENDMENT, STATE SOVEREIGN IMMUNITY, 11 U.S.C. § 106, WAIVER, AND THE "COMPULSORY COUNTERCLAIM" RULE

A. The Law Related to the 11th Amendment and State Sovereign Immunity

The primary focus in 11th Amendment Immunity cases should be upon the impact on the state treasury. *Hess v. Port Authority Trans-Hudson*, 513 U.S. 30, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994). The law does not allow retroactive damages be imposed if those payments must, in reality, come from the state treasury. If monies must be

paid from the state treasury, the suit is treated as actually being brought against the state. *Ford Co. v. Dept. of Treasury*, 323 U.S. 459, 655 S.Ct. 347, 89 L.Ed. 389 (1945); *Great Northern Insurance Co. v. Read*, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944). The 4th Circuit has interpreted *Hess* to mean that the most important factor in determining 11th Amendment Immunity is whether the state treasury will pay any resulting judgment. *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996).

Here, via a state law claim based upon quantum meruit, the Petitioner asks for the payment of funds being held by the West Virginia State Treasurer through the fiction of creating a constructive trust. Of course, Petitioners' claim is not based upon a violation of federal law for prospective injunctive relief, it is a state law claim for retroactive money damages. A type of claim clearly not allowable under the law. *Harter v. Vernon*, 101 F.3d 334, 337 (4th Cir. 1996), *LCS Services, Inc. v. Caperton*, 976 F. Supp. 405 (N.D.W.Va. 1997), and *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998).

Here, it is the state treasury that would be responsible for paying any attorneys fees to the Petitioners, since all funds paid in the criminal restitution matter were held by the State Treasurer in the State of West Virginia's Special Reclamation Fund. W. Va. Code § 22-3-11(g). This gives the WVDEP immunity from the Petitioners' claims in the Federal Court system under *Ford*, *Great Northern Insurance*, and *Harter*. Since there is no *res* to fund the constructive trust except for the state treasury, Petitioners claims should be brought in state court.

B. The Constitutionality of 11 U.S.C. § 106 and Waiver

In the landmark case of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the United States Supreme Court held the 11th Amendment prevents Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause.

Since *Seminole*, many Courts have addressed the issue of 11th Amendment Immunity, in particular, many post-*Seminole* cases have implicated 11 U.S.C. § 106 of the Bankruptcy Code. The overwhelming majority of these cases follow the mandate of *Seminole* that Congress may not rely on Article I powers in abrogating 11th Amendment Immunity, that only pursuant to Section 5 of the 14th Amendment may such abrogation be legally effectuated.

WVDEP states that there are really four different types of decisions related to the validity of 11 U.S.C. § 106 and/or whether a State waives its immunity filing a proof of claim.

C. 11 U.S.C. § 106 is Unconstitutional

The WVDEP asserts that an overwhelming majority of Courts have held that 11 U.S.C. § 106 is unconstitutional because Congress improperly relied on Article I powers rather than Section 5 of the 14th Amendment in enacting 11 U.S.C. § 106, and, do not address the issue of waiver by filing Proof of Claim. *In the Matter of Estate of Fernandez*, 123 F.3d 241 (5th Cir. 1997) (rehearing denied 130 F.3d 1138 (5th Cir. 1997); *In re NVR, LP*, 189 F.3d 442 (4th Cir. 1999) (emphasizing the Bankruptcy Court's jurisdiction

over the debtor and its estate rather than the State); *In re Mitchell*, 209 F.3d 1111 (9th Cir. 2000); *In re Mayes*, 294 B.R. 145 (10th Cir. BAP 2003); *In re Vegilante*, 261 B.R. 817 (2001); *In re Ellet*, 254 F.3d 1135 (9th Cir. 2001); *In re Chandler*, 251 B.R. 872 (10th BAP 2000); *In re Petersen*, 254 B.R. 740 (Bank. N.D. Ill. 2000); *In re Sae Young Westmont-Chicago*, 276 B.R. 888 (Bank. N.D. Ill. 2002); *Venable v. Acosta*, 280 B.R. 916 (2002); *In re King*, 280 B.R. 767 (Bank. S.D. Ga. 2002); *In re Janc*, 251 B.R. 525 (Bank. W.D. Mo. 2000); *In re Womack*, 252 B.R. 247 (Bank. E.D. Ark. 2000); *In re Claxton*, 273 B.R. 174 (Bank. N.D. Ill. 2002); *In re Palm*, 286 B.R. 710 (Bank. N.D. Iowa 2002); *In re Levin*, 284 B.R. 308 (Bank. S.D. Fla. 2002); *In re Bozeman*, 278 B.R. 275 (Bank. M.D. Ga. 2002); *In re LTV Steel*, 264 B.R. 455 (Bank. N.D. Oh. 2001); *Alabama Dept. of Human Resources v. Lewis*, 279 B.R. 308 (S.D. Ala. 2002).

With the overwhelming majority of Courts holding 11 U.S.C. § 106 unconstitutional, the Petitioners' request should be denied.

D. 11 U.S.C. § 106 is Unconstitutional and Filing a Proof of Claim Acts as a Waiver for only Compulsory Counterclaims

Most courts hold that 11 U.S.C. § 106 is unconstitutional for the reasons stated above, and, that when a State files a Proof of Claim it only waives its 11th Amendment Immunity for compulsory counterclaims. ***In Re Creative Goldsmiths (Schlossburg v. Maryland)*, 119 F.3d 1140 (4th Cir. 1997) (this case is the controlling precedent in the underlying 4th Circuit Order)**; *In re ABEPP Acquisition Corp.*, 215 B.R. 513 (6th Cir. BAP Ohio 1997); *In re Sacred Heart Hospital of Norristown*, 133 F.3d 237, 240 (3rd Cir. 1998) (affirming Dist. Ct. ruling that debtors

claims did not rise out of same transaction or occurrence as State's Proof of Claim, therefore no waiver); *In re Lazar*, 237 F.3d 967, 978 (9th Cir. 2001); *In re Microage Corp.*, 288 B.R. 842 (Bank. D. Ariz. 2003).

Placed in this category of cases for convenience, some courts have held that 11 U.S.C. § 106(a) is unconstitutional but that § 106(b) is still valid. *See Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17 (1st Cir. 2001), and, *In re Straight*, 143 F.3d 1387 (10th Cir. 1998) (both holding § 106(b) is still constitutional – waiver only for compulsory counterclaims). Further, in the non-bankruptcy context, the D.C. Circuit has adopted the waiver of immunity for compulsory counterclaims only rule. *Regents of the Univ. of N.M. v. Knight*, 321 F.3d 1111 (D.C. Cir. 2003).

Here, Petitioners' claims (implied contact/quantum meruit) in their Motion, were not based upon "the same transaction or occurrence" of the Petitioners claims (which related to injunctive relief against the Bankrupt Estate for remediation of AMD pollution). There were no counterclaims filed by the Petitioners to the WVDEP's proof of claim, only objections as to the amount; therefore, there was no waiver of 11th Amendment Immunity.

The "waiver" of jurisdiction only for compulsory counterclaims was the law prior to the *Seminole Tribe* and its progeny (and continues through today). *See U.S. v. Forma*, 42 F.3d 759 (2nd Cir. 1994) – suit by federal government does not waive immunity from counterclaims, except as to recoupment up to the amount of the government's claim; no affirmative recovery allowed, although the *Forma* case deals with the federal government; the principle is equally applicable to 11th Amendment cases;

In re Friendship Medical Center, Ltd. (Jones v. Yorke), 710 F.2d 1297, 1300-1301 (7th Cir. 1983) (discussing prior Bankruptcy Act and concluding that waiver was only as to recoupment of mandatory counterclaims; no affirmative recovery allowed); *Rebel Coal Co. v. United States*, 944 F.2d 320 (6th Cir. 1991) (preference claim for return of funds garnished to pay Mine Safety Act fines was not a compulsory counterclaim to the government's claim for uncollected fines; though claims are related, factual and legal issues raised by each are too dissimilar to satisfy compulsory counterclaim rule); *Ohio v. Madeline Marie Nursing Homes #1 and #2*, 694 F.2d 449 (6th Cir. 1982) (filing proof of claim with respect to payments made to debtor in 1973-1975 was not consent to counterclaims by debtor for monies allegedly owing in 1978); and, *U.S. v. Mottolo*, 605 F. Supp. 898 (D. N.H. 1985) and cases cited therein.

Accordingly, since the history of case law, both pre- and post-*Seminole Tribe* hold that "waiver" only occurs for compulsory counter claims. Petitioners' request should be denied because their Motion was not a related counterclaim.

E. 11 U.S.C. § 106 is Unconstitutional and Filing a Proof of Claim is a Waiver for all Claims

There are a few cases which state that 11 U.S.C. § 106 is unconstitutional and that a State waives its immunity when it files a Proof of Claim. For some reason, these courts are generally silent as to the waiver for compulsory counterclaim rule. The reason they are silent is because they relate to Bankruptcy discharge. *In re Burke*, 146 F.3d 1313 (11th Cir. Ga. 1998), *cert. denied*, 527 U.S. 1043, 119

S.Ct. 2410 (1999); *In re Rose*, 227 B.R. 518 (W.D. Mo. 1998); *In re Stanley v. Student Loan Services, Inc.*, 273 B.R. 907 (Bank. N.D. Fla. 2002); *In re Jordan*, 275 B.R. 755 (2002) (dischargability case stating in dicta that a state may waive by filing proof of claim; *Jordan* is however, silent as to whether that would be complete waiver or waiver for only counterclaims based on the same transaction or occurrence).

Like in Petitioners' brief (Pet. Br. p. 15), these cases generally rely on the case of *Gardner v. New Jersey*, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947). *Gardner* and other like cases can be distinguished from the instant matter because they are cases dealing with adjudication and/or discharge of the claim itself. Common sense tells you that these items are clearly something that Bankruptcy court should have jurisdiction over. The Court in *Gardner* held that "[w]hen the state becomes the actor and files a claim against the fund, it waives immunity it might otherwise have had respecting *adjudication* of the claim." (Emphasis added) *Id.* at 574, 472.

Similar to this line of cases are matters where a state removes a case to Federal Court and then tries to utilize 11th Amendment Immunity. The removal constitutes a waiver in these cases because otherwise, the state would have an unfair tactical advantage. *Lapides v. Bd. of Regents of the Univ. System of Ga.*, 122 S.Ct. 1640 (2002).

Respondent asserts that these cases are inapplicable to the matter at hand, these cases relate to discharge or other traditional Bankruptcy jurisdiction issues. Or, these cases relate to unfair advantages attempted by states in

their litigation conduct. None of the traditional Bankruptcy jurisdiction issues are present here, therefore, the Petition should be denied.

F. 11 U.S.C. § 106 is Constitutional

Finally, there are cases which hold that the Article I "uniform laws" provisions of the Constitution provide an adequate basis for Congress to abrogate 11th Amendment Immunity and therefore, 11 U.S.C. § 106 is Constitutional. (Pet. Br., p. 10). *In re Hood*, 319 F.3d 755 (6th Cir. 2003); *In re Bliemeister*, 251 B.R. 383 (Bank. D. Ariz. 2000) (this case was affirmed not on the "uniform laws" issue, but on "waiver," *see In re Bliemeister*, 296 F.3d 858 (9th Cir. 2002)); *In re Nelson*, 254 B.R. 436 (Bank. W.D. Wis. 2000) (this case was reversed, with the 7th Circuit holding that Article I is not a valid source of authority for Congress to abrogate state sovereign immunity despite the uniformity requirement, *see Nelson v. LaCrosse County Dist. Attorney (State of Wisconsin)*, 301 F.3d 820 (7th Cir. 2002)).

Only the 6th Circuit and its underlying Courts via *Hood* hold on to the "uniform laws" analysis. *Hood* deals with the question of dischargability. *Hood* has at its core the state looking to the 11th Amendment for protection as it seeks to collect from a discharged debtor. *Hood* does not have a similar fact pattern to the instant case whereby the State is relying on the 11th Amendment to protect it from a private state law claim. Interestingly enough, the 6th Circuit Bankruptcy panel previously agreed with the Respondent-WVDEP that dismissal of a private suit based on sovereign immunity is appropriate. *In re ABEPP Acquisition Corp.*, 215 B.R. 513 (6th Cir. BAP Ohio 1997).

The original District of Arizona Bankruptcy Court which authored the "original" *Bliemeister* "uniformity of laws" analysis has now changed its position. In *In Re Microage Corp.*, 288 B.R. 842 (Bankr. D. Ariz. 2003), the Court now joined the overwhelming majority of Courts that have ruled that Congress did not have the authority to abrogate the state's sovereign immunity in 11 U.S.C. § 106(a). The *Microage* Court gives an excellent dissertation on why the "uniform law" provisions do not provide the authority for Congress to **abrogate** sovereign immunity, instead, the provisions give authority for Congress to pass "uniform" **legislation** in Bankruptcy matters. *Id.* at 845-850. *Microage* stands for the proposition that, "a Bankruptcy court may determine a state's rights in the debtor's estate, not that a debtor may actively pursue recovery against a state for monies allegedly owed." *Id.* at 847.

Since, the 6th Circuit (via *Hood*) is the only Circuit upholding the "uniform laws" as a valid basis for abrogation analysis, the Petition should be denied.

THE LIMITED NATURE OF BANKRUPTCY COURT JURISDICTION

The central basis of Bankruptcy Court jurisdiction derives from its inherent authority to exercise dominion and control over the debtor and the debtor's estate. To the extent that the exercise of this jurisdiction implicates assertion of rights against the State, it is simply a necessary and fundamental by-product of Congress' right to pass "uniform" Bankruptcy legislation. This does not mean that Congress has a right to pass legislation abrogating

the 11th Amendment of the Constitution. The Bankruptcy Court may exercise jurisdiction over the debtor and/or the debtor's estate necessary for the appropriate adjudication of the debtor and/or the estate's rights and obligations. The Court may not extend its jurisdiction beyond that which is required for such adjudication.

Here, all of the matters of the Estate of T & T had already been finalized and distribution had already occurred when the Petitioners filed the underlying Motion on their own behalf. The underlying Motion did not assert the rights of the debtor or the debtors estate, but rather private third-party rights. The Motion is therefore, fundamentally outside the traditional scope of Bankruptcy jurisdiction.

"[T]he proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to Bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedoms of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984). *See also, A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 1002 (4th Cir.), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1989); *In the Matter of Zale Corp.*, 62 F.3d 746 at 752 (5th Cir. 1995). The instant Motion could not alter debtor's rights, liabilities, options or freedom of actions and could not impact the Bankruptcy Estate of T & T Fuels, Inc. The Petitioners' Motion bears no logical relationship with the debtor or the debtor's estate and therefore, falls outside the scope of the Bankruptcy court's jurisdiction.

FUNDAMENTAL FAIRNESS

Rule 3002(a) of the FRBC states that: "[a]n unsecured creditor . . . *must* file a proof of claim or interest to be allowed . . . " (emphasis added). This mandatory requirement, when combined with Petitioners' claim that the "uniform law" provisions provide an adequate basis for the abrogation in 11 U.S.C. § 106, indicate that the State is being put in a fundamentally unfair position. It *must* file a proof of claim in order to assert its rights, and in doing so, it is being "forced" to waive sovereign immunity.

In addition, the facts of this case add to the "fundamental fairness" argument. The WVDEP was asked to come into the Federal Court to establish its rights as a "victim" in the Paul Thomas criminal restitution hearing. Of course, Respondent "jumped at the chance." After all, it was paying tens of thousands a month of taxpayers dollars to treat the AMD. Respondent recognized that the Trustee had previously lost a Motion for Summary Judgment against Paul Thomas in the Petitioners' Adversary Proceeding in Bankruptcy Court. Clearly, it behooved the Respondent-WVDEP to obtain the restitution monies as soon as possible and not to wait on, what appeared at that time to be, the dubious claim of the Petitioner. It was inconceivable to expect the Respondent-WVDEP to continue to expend taxpayers dollars, to wait until the Trustee prevailed in the adversary proceeding against Paul Thomas, and then, wait additional time until assets of the estate were distributed. Just because the Respondent followed what any reasonable State Agency would do in protecting the environment and the public fisc, it does not follow that those actions somehow constitute a waiver of its immunity in an unrelated Bankruptcy case. These

cases, the Bankruptcy and the criminal restitution case, were, in fact, unrelated cases.

There must be a clear declaration by the state that unequivocally shows that it has specifically decided to allow itself to be sued in Federal Court. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). Respondent asserts that it did not give any waiver of its immunities, either expressly, by a clear, unequivocal declaration, which is required, nor even, by implication. The facts of this case and "fundamental fairness" demand that the filing of a "forced" proof of claim **not** constitute a waiver of 11th Amendment Immunity.

PETITIONERS SHOULD FILE THEIR CLAIMS IN STATE COURT

W. Va. CONST. Art. VI, § 35 provides that: "[t]he State of West Virginia shall never be made a defendant in any court of law or equity." Here, the Petitioners are attempting to bring state law claims in a Federal Court, something clearly not allowed under the law. However, the Petitioners are not without recourse. The most likely forum for the Petitioners to recover in this matter would be the State of West Virginia Court of Claims. W.Va. Code §§ 14-2-1 to -29. *See, West Virginia Ex rel. McLaughlin v. West Virginia Court of Claims*, 549 S.E.2d 286 (W. Va. 2001).

CONCLUSION

For these reasons, the 4th Circuit Court's decision should be affirmed and the Petition For Writ of Certiorari denied.

Respectfully submitted,

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